Vijayapal Singh a/l Hira Singh v Teja Singh Penesar (sued as the secretary of the Penang Sports Club) & Anor

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 25–56 OF 2002
KAMALANATHAN RATNAM J
7 MAY 2003

Labour Law *— Employment — Dismissal — Second dismissal — Whether res judicata — Employee dismissed from service — High Court ordered reinstatement — Court of Appeal reversed High Court and upheld dismissal — Employers continuing to engage employee pending disposal of application of leave to appeal to Federal Court — Whether employers could issue fresh dismissal — Whether employers could rely on decision of Court of Appeal to dismiss employee — Whether delay in employer acting to dismiss employee caught by doctrine of estoppel*

The plaintiff worked in the Penang Sports Club ('the club') as a bar captain. In October 1989 the plaintiff was dismissed from service. In December 1994 the Industrial Court ordered the plaintiff's reinstatement with no loss in salary. The club's application to file for an extension of time to obtain an order of certiorari was dismissed by the High Court in April 1995. The club's appeal was allowed by the Court of Appeal in April 1996. The plaintiff's leave to appeal against that decision to the Federal Court has yet to be heard. The plaintiff alleged that sometime in mid-December 1998 the vice president of the club summoned the plaintiff to his office and directed him to withdraw his leave application to the Federal Court, to apologize and to apply to continue to work for the club. The plaintiff was assured that the club would agree to allow the plaintiff to continue to work in the club. However in January 1999, some $2^1/_2$ years after the decision of the Court of Appeal in their favor, the club informed the plaintiff of the termination of his services on the grounds that the plaintiff had failed to obtain an order to stay proceedings until his application for leave to appeal to the Federal Court was heard. The plaintiff argued that the club's conduct was unfair and based on mala fides. Further the plaintiff contended that due to laches, the club was estopped from terminating the plaintiff's services and that the club was deemed to have waived any right they had had, due to the delay in acting. The plaintiff argued that, having agreed, by a letter dated 1 December 1997, to allow the plaintiff to continue to work at the club, the club's letter dated 14 January 1999 terminating the plaintiff's services for failing to obtain a stay of proceedings was in breach of the agreement to allow him to continue working. The plaintiff contended that he had a legitimate expectation to work in the club until such time as his leave application was heard. The plaintiff thus sought an order for reinstatement. The Minister For Human Resources ('the minister'), however, stated that he was satisfied that there was no need to refer the matter to the Industrial Court as (i) the decision of the club to terminate the plaintiff's services on 28 February 1999 was in accordance with the decision of the Court of Appeal; and (ii) the

plaintiff ought to have applied for a stay of proceedings of the order of the Court of Appeal pending the decision of the leave application to the Federal Court. The action of the plaintiff in filing another representation against the second dismissal would be met with the principle of res judicata. The plaintiff thus sought (a) an order of certiorari to cancel the order of the minister whereby the plaintiff's request for reinstatement was rejected and whereby the minister had also refused to refer the matter to the Industrial Court; (b) an order of mandamus directing the minister to refer the matter to the Industrial Court; (c) reinstatement without any loss in salary or of benefits; (d) damages; and (e) costs.

Held, granting leave to issue certiorari and mandamus with costs in the cause:

(1) The club issued out the second letter of dismissal dated 14 January 1999 purely on the basis that the plaintiff had failed to apply for a stay of the order of the Court of Appeal. But this was totally incorrect. In his affidavit in support the plaintiff had averred that, by a letter dated 1 December 1997, the club had agreed to allow the plaintiff to continue working in the club until the hearing and disposal of the plaintiff's leave application before the Federal Court. This averment had not been specifically denied. Notwithstanding the fact that the plaintiff himself had failed to exhibit this very important letter, the silence of the club in respect of this averment spoke volumes (see p 143F–H).

(2) It was therefore patently clear from the second termination letter dated 14 January 1999 that (a) the club knew of the plaintiff's leave application to the Federal Court and that it was still pending; and (b) the club had, without any restrictions or conditions, allowed the plaintiff 'to continue working notwithstanding'. Such leave to allow the plaintiff to continue working must have been pursuant to the said letter dated 1 December 1997 which, though neither side had exhibited, the existence of which had not been denied by the club (see p 144G–I).

(3) The conduct of the club in allowing the plaintiff to continue to work until the hearing and disposal of his leave application to the Federal Court, without any terms and conditions, constituted a waiver of the club's right to enforce the order of the Court of Appeal. The club was estopped from issuing the same notice of termination which was issued nearly $2^1/_2$ years later (see p 145A–B).

[Bahasa Malaysia summary

Plaintif telah berkhidmat di Penang Sports Club ('kelab tersebut') sebagai seorang kapten bar. Pada October 1989 plaintif telah dibuang

kerja. Pada Disember 1994 Mahkamah Perusahaan telah mengarahkan plaintif dikembalikan semula jawatannya tanpa kehilangan gaji. Permohonan kelab tersebut bagi lanjutan masa untuk mendapat perintah certiorari telah ditolak oleh Mahkamah Tinggi pada April 1995. Rayuan kelab tersebut telah dibenarkan oleh Mahkamah Rayuan pada April 1996. Permohonan plaintif bagi kebenaran merayu keputusan tersebut kepada Mahkamah Persekutuan masih belum didengar. Plaintif mengatakan bahawa pada pertengahan bulan Disember 1998, naib presiden kelab tersebut telah memanggil plaintif ke pejabatnya dan mengarahkannya supaya menarik balik permohonan untuk kebenaran ke Mahkamah Persekutuan, memohon maaf serta memohon supaya dibenarkan terus berkhidmat dalam kelab tersebut. Plaintif telah diberi keyakinan bahawa kelab tersebut akan bersetuju membenarkan plaintif terus berkhidmat dengan kelab tersebut. Walau bagaimanapun pada January 1999, lebih kurang $2^1/_2$ tahun selepas keputusan Mahkamah Rayuan diberikan memihak mereka, kelab tersebut telah memberitahu plaintif bahawa perkhidmatannya telah ditamatkan di atas alasan bahawa plaintif gagal mendapatkan perintah penggantungan sehingga permohonannya untuk kebenaran merayu kepada Mahkamah Persekutuan didengar. Plaintif berhujah bahawa tingkah laku kelab tersebut adalah tidak adil dan berasaskan mala fide. Seterusnya plaintif telah mendakwa bahawa memandangkan kelewatan, kelab tersebut diestop daripada menamatkan perkhidmatan plaintif dan kelab tersebut dianggap telah menepikan sebarang hak memandangkan kelewatan bertindak. Plaintif berhujah bahawa, setelah bersetuju, dalam surat bertarikh 1 Disember 1997, membenarkan plaintif terus berkhidmat dengan kelab tersebut, surat kelab tersebut bertarikh 14 Januari 1999 menamatkan perkhidmatan plaintif kerana kegagalannya mendapatkan penggantungan prosiding melanggar persetujuan membenarkannya meneruskan perkhidmatan. Plaintif mendakwa bahawa beliau mempunyai harapan yang sah untuk berkhidmat dengan kelab tersebut sehingga masa permohonan kebenarannya didengar. Maka plaintif telah memohon perintah pengembalian semula jawatannya. Menteri Sumber Manusia ('menteri tersebut'), bagaimanapun, menyatakan bahawa beliau berpuas hati perkara ini tidak perlu dirujuk kepada Mahkamah Perusahaan memandangkan (i) keputusan kelab tersebut menamatkan perkhidmatan plaintif pada 28 Februari 1999 adalah menurut keputusan Mahkamah Rayuan; dan (ii) plaintif patut memohon penggantungan prosiding perintah Mahkamah Rayuan sehingga keputusan permohonan kebenaran ke Mahkamah Persekutuan. Tindakan plaintif dalam memfailkan representasi seterusnya terhadap pembuangan kerja kali kedua bercanggah dengan prinsip res judicata. Maka plaintif memohon (a) perintah certiorari membatal perintah menteri tersebut di mana permohonan plaintif bagi pengembalian semula jawatannya telah ditolak dan di mana menteri tersebut telah enggan merujuk perkara ini ke

A B C D E F G H I

A Mahkamah Perusahaan; (b) perintah mandamus mengarahkan menteri tersebut merujuk perkara ini kepada Mahkamah Perusahaan; (c) pengembalian semula kerja tanpa kehilangan upah mahupun ganjaran; (d) ganti rugi; dan (e) kos.

B **Diputuskan**, memberikan kebenaran untuk mengeluarkan certiorari and mandamus dengan kos dalam kausa:

(1) Kelab tersebut telah mengeluarkan surat pembuangan kerja yang kedua yang bertarikh 14 Januari 1999 semata-mata berdasarkan bahawa plaintif telah gagal memohon penggantungan perintah Mahkamah Rayuan. Akan tetapi ini tidak betul. Dalam afidavit sokongannya plaintif menegaskan bahawa, melalui surat bertarikh 1 Disember 1997, kelab tersebut telah bersetuju membenarkan plaintif terus berkhidmat dengan kelab tersebut sehingga pendengaran dan penyelesaian permohonan kebenaran plaintif di hadapan Mahkamah Persekutuan. Penegasan ini tidak pernah dinafikan. Walaupun plaintif sendiri telah gagal melampirkan surat yang sangat penting ini, kegagalan kelab tersebut menyentuh penegasan ini menimbulkan prasangka (lihat ms 143F–H).

(2) Maka adalah jelas daripada surat pemberhentian kerja kedua bertarikh 14 Januari 1999 bahawa (a) kelab tersebut tahu akan permohonan kebenaran plaintif kepada Mahkamah Persekutuan dan ia masih belum diselesaikan; dan (b) kelab tersebut telah, tanpa sebarang sekatan atau syarat, membenarkan plaintif 'to continue working notwithstanding'. Kebenaran membolehkan plaintif meneruskan perkhidmatannya semestinya menurut surat bertarikh 1 Disember 1997 itu yang mana walaupun tidak dilampirkan oleh kedua-dua pihak, kewujudan surat tidak pernah dinafikan oleh kelab tersebut (lihat ms 144G–I).

(3) Tingkah laku kelab tersebut membenarkan plaintif meneruskan perkhidmatannya sehingga pendengaran dan penyelesaian permohonan kebenaran beliau kepada Mahkamah Persekutuan, tanpa sebarang terma dan syarat, merupakan satu penepian hak kelab tersebut untuk menguatkuasakan perintah Mahkamah Rayuan tersebut. Kelab tersebut diestop daripada mengeluarkan notis penamatan perkhidmatan yang sama yang dikeluarkan hampir $2^1/_2$ tahun kemudian (lihat ms 145A–B).]

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Notes

For cases on dismissal from employment, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 813–832.

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Legislation referred to

Industrial Relations Act 1967 s 20(3)

Darshan Singh Khaira (*Darshan Singh & Co*) for the applicant. A
Surinder Singh (*Ong & Manecksha*) for the first respondent.
Nizam bte Zakaria (Peguam Persekutuan) for the second respondent.

Kamalanathan Ratnam J: B

The application

This is an application by the plaintiff:

(a) for an order of certiorari to cancel the order of the Minister For Human Resources ('the minister') dated 16 May 2002 whereby the applicant's request for reinstatement was rejected and whereby the minister had also refused to refer the matter to the Industrial Court; C

(b) for an order of mandamus directing the minister to refer the matter to the Industrial Court;

(c) that he be reinstated without any loss in salary or of benefits; D

(d) for damages and any further order that is fair and reasonable;

(e) for an order that costs of this application be costs in the cause.

Plaintiff's case E

The applicant worked in the Penang Sports Club ('the club') as a bar captain and drew a salary of RM1,250 per month. On 1 October 1989 the applicant was dismissed from service. On 23 December 1994 the Industrial Court ordered the applicant's reinstatement with no loss in salary. The first respondent's application to file for an extension of time to obtain an order of certiorari was dismissed by the High Court on 24 April 1995. The first F respondent's appeal was allowed by the Court of Appeal on 10 April 1996. The applicant's leave to appeal against that decision to the Federal Court has yet to be heard.

It is the plaintiff's case that sometime in mid December 1998 the vice president of the club summoned the applicant to his office and directed him G to withdraw his leave application to the Federal Court, to apologize and to apply to continue to work for the club and that the first respondent would agree to allow the applicant to continue to work in the club. However on 14 January 1999 the first respondent informed the applicant by a letter, of the termination of his services with effect from 28 February 1999 on the basis that the applicant had failed to obtain an order to stay proceedings H until the leave application to the Federal Court is heard. The applicant pointed out that this letter was sent nearly $2^1/_2$ years after the decision of the Court of Appeal. By his letter dated 18 January 1999 the applicant informed the first respondent that the first respondent's conduct was unfair and based on mala fides. Further the applicant contended that due to laches, the first respondent is estopped from terminating the applicant's services and that I further the first respondent is deemed to have waived any right he had had, due to delay in acting.

By a letter dated 1 December 1997 the first respondent agreed to allow the applicant to continue working in the club until the hearing and disposal of the applicant's leave application before the Federal Court.

It is the applicant's case that having agreed by his letter dated 1 December 1997 to allow the applicant to continue to work at the club the letter of the first respondent dated 14 January 1999 terminating the applicant's services for failing to obtain a stay of proceedings is in breach of the agreement to allow him to work. The applicant contended that he had a legitimate expectation to work in the club until such time as his leave application was heard. On 22 June 2002 the applicant received a letter dated 17 June 2002 from the office of the minister stating that pursuant to s 20(3) of the Industrial Relations Act 1967 there was no need to refer the matter to the Industrial Court. There was also enclosed, the decision of the minister which gave two reasons for the refusal of the minister to refer this matter to the Industrial Court. They were:

(1) that the decision of the club to terminate the applicant's services on 28 February 1999 was in accordance with the decision of the Court of Appeal given on 10 October 1996;

(2) that the applicant ought to have applied for a stay of proceedings of the order of the Court of Appeal pending the decision of the leave application to the Federal Court. The action of the applicant in filing another representation against the second dismissal would be met with the principle of res judicata.

Findings of the court

This is a very peculiar case. Whilst the first dismissal is now the subject matter of leave proceedings in the Federal Court the applicant filed these proceedings against the second dismissal of the applicant by a letter dated 14 January 1999 with the dismissal taking effect on 28 February 1999. The first respondent issued out the said letter dated 14 January 1999 purely on the basis that the applicant had failed to apply for a stay of the order of the Court of Appeal. But this is totally incorrect. In his affidavit in support the applicant had averred that by a letter dated 1 December 1997 the first respondent had agreed to allow the applicant to continue working in the club until the hearing and disposal of the applicant's leave application before the Federal Court. This averment has not been specifically denied. Notwithstanding the fact that the applicant himself had failed to exhibit this very important letter, the silence of the first respondent in respect of this averment must speak volumes. Instead of denying that there was such a letter or at least calling for its production, the first respondent averred in reply that the club was at the early stages hoping for an early date for the hearing of the leave application. However Mr Surinder for the club argued that to date the club had not received even the case number of the leave application to the Federal Court nor did the club know anything relating to the present situation of the leave application. To a specific question from the court, counsel for the first respondent said, 'We do not know about the leave application'. At this juncture the court referred counsel to the first

respondent's own affidavit exh PSC2 which was the second termination letter dated 14 January 1999 which merits reproduction. It reads as follows:

KELAB SUKAN PULAU PINANG;
(Penang Sports Club)
JALAN UTAMA,
10450 PULAU PINANG.

TEL: 2297834/2294541
FAX: 2292391
E-MAIL: pspClub@po.jaring.my

14 January 1999

Mr Vijayapal Singh
No 125A Solok Bunga Raya
Bukit Glugor
11700 Penang

Private & Confidential

Dear Sir,

The Industrial Court's award ordered you to be reinstated to which the Club adhered to. However, our appeal to the High Court to quash the Industrial Court's award was unsuccessful and our appeal to the Court of Appeal was unanimously allowed on 10 October 1996. Your solicitors then applied to the Federal Court for leave to appeal and which is still pending. Meanwhile, the club allowed you to continue working notwithstanding. As you have not obtained the stay of proceedings, the club requires you to cease work with effect from 28 February 1999.

Thank you.

Yours faithfully,
KELAB SUKAN PULAU PINANG
(Penang Sports Club)

(Sgd)
... ...
Hon Secretary
TEJA SINGH PENESAR

Received original of the above
... ...
Signature
Date: ... ...

It is therefore patently clear from this letter:

(1) that the club knew of the applicant's leave application to the Federal Court and that it is still pending;

(2) that the club had without any restrictions or conditions allowed the applicant 'to continue working notwithstanding'.

I assume that this leave to allow the applicant to continue working must have been pursuant to the illusive letter dated 1 December 1997 which neither side had exhibited, but the existence of which however, has not been denied by the first respondent.

A To my mind the conduct of the club in allowing the applicant to continue to work until the hearing and disposal of its leave application to the Federal Court, without any terms and conditions must constitute a waiver of the first respondent's right to enforce the order of the Court of Appeal. Surely it must be that if not for this letter the applicant himself would have applied for a stay of execution of the order of the Court of B Appeal. The first defendant is in my view estopped from issuing the same notice of termination which was issued nearly $2^1/_2$ years later.

Since the leave to issue the orders of certiorari and mandamus was given only in respect of prayers (a) and (b), I grant an order in terms of prayers (a) and (b) with costs in the cause as prayed for.

C *Leave to issue certiorari and mandamus granted with costs in the cause.*

Reported by Sivapragasam Kumaran

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